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No. 05-1421

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In The Supreme Court of the United States

NORTHERN ILLINOIS CHAPTER OF ASSOCIATED BUILDERS AND CONTRACTORS AND CONTRACTORS, INC. AND LOBERG EXCAVATING, INC.,

Petitioners,

v.

JACK LAVIN, in his official capacity as DIRECTOR OF THE ILLINOIS DEPARTMENT OF COMMERCE AND ECONOMIC OPPOSRTUNITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JACK LAVIN, in his official capacity
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AND ECONOMIC OPPORTUNITY

Respondent.

On Petition For Writ Of Certiorari To The
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Circuit

PETITIONERS' REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent's Opposition to the Petition misstates the holding of the Seventh Circuit in an unsuccessful effort to obscure the serious conflicts created by the court's erroneous decision. If

anything, the Opposition highlights the confusion engendered by the Seventh Circuit's novel insertion of "federal subsidy" case law into the unrelated field of federal preemption of state labor law. It remains necessary for the Court to grant the Petition in order to reconcile the conflicting interpretations of this Court's *Boston Harbor* decision.

It must be recalled that the Respondent did not argue to the panel below for the preemption standard ultimately adopted by the court of appeals and now advocated by the Opposition. Rather, Illinois earlier contended that its legislature was acting as a proprietor/market participant within the meaning of *Boston Harbor* by enacting a statute that required private owners of renewable fuel plants to enter into labor agreements as a condition of receiving state funding. The Seventh Circuit rejected the State's contention, and the district court's acceptance of it, observing that "the problem with this view is that the state is not the proprietor *of* anything." (App. 2a) (emphasis in original).

The court of appeals declared, however, that rejection of the State's "proprietary" interests did not "resolve the main question." The Seventh Circuit then asked (and answered) *sua sponte* what it considered to be the "main question," though neither party had previously presented it to the court: "Is a condition on the receipt of a grant a form of regulation?" The court answered this question in the negative by relying almost exclusively on this Court's "federal spending" decisions none of which addressed in any manner the *Boston Harbor* decision

or federal preemption of state law generally, let alone state labor law. (App. 3a-5a). [1]

Under these circumstances, the Respondent's Opposition is simply wrong to pretend that "this reasoning created no new test for NLRA preemption." (Opp. At 19). Of course it did. Moreover, as argued in the Petition, the Seventh Circuit's new test conflicts with the interpretations of *Boston Harbor* previously set forth in other court of appeals decisions, including *inter alia* the following:

- Before this case, *Boston Harbor* was understood to be a narrow exception from the general prohibition of state interference with private sector labor law, limited to those circumstances when state agencies "exemplified" market forces by acting in a proprietary fashion, *i.e.*, as project owners procuring construction services in the same manner as private actors. Pet. at 8. Under the Seventh Circuit's ruling, the proprietary limitation apparently no longer applies.

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[1] The Opposition disingenuously refers to the Seventh Circuit's exposition on the federal spending cases (taking up more than one-third of the court's opinion) as a mere "mention." (Opp. at 18). Apparently recognizing that little can be said in its favor, the Opposition offers no substantive analysis of the court's treatment of the federal spending doctrine (*Id.* at 19), nor does the Opposition even attempt to explain the apparent inconsistencies in the court's unprecedented application of the federal spending cases to the field of labor law preemption. *See* Pet. at 11-14.

- Before this case, *Boston Harbor* was understood to exempt from federal preemption a project-specific set of labor conditions imposed by a state agency as the owner of the project. Under the Seventh Circuit's ruling, that limitation has been abandoned as well, given that the court has now upheld an across-the-board state statute, applying to many projects and applying to projects in which the state has no ownership role.

- Before this case, *Boston Harbor* was understood to require the analysis described in *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F. 3d 686 (5th Cir. 1999) to distinguish between proprietary and regulatory activity.[2] The Seventh Circuit's ruling has ignored and plainly departed from the *Cardinal Towing* analysis.

- Before this case, pursuant to the *Cardinal Towing* test, *Boston Harbor* was understood to require that a challenged state action essentially reflect the entity's own interest in its efficient procurement of needed goods and services. But the Seventh Circuit found no state procurement interest here at all (other than to "shower benefits" on union supporters).

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[2] *See also Olympic Pipe Line Co. v. City of Seattle*, 437 F. 3d 872, 881 (9th Cir. 2005); *Sprint Spectrum L.P. d/b/a Sprint PCS v. Mills*, 283 F. 3d 404 (2d Cir. 2002); and *Healthcare Ass'n of New York State, Inc. v. Pataki*, 388 F. Supp. 2d 6, 23 (N.D. NY 2005), *appeal pending* (2d Cir.).

- Before this case, under the *Cardinal Towing* test, *Boston Harbor* was understood to require that the proprietary/regulatory interest of a challenged state action be measured by comparison with the typical behavior of private parties in similar circumstances. But the Seventh Circuit made no finding that private parties engage in similar behavior to that of the State in enacting a law conditioning the receipt of state funds on the adoption of labor agreements.[3]

- Before this case, constitutional limits on federal spending were deemed to present "an entirely different question from what States may do with the [NLRA] in place." *Wisconsin Dept. of Ind., Labor and Human Relations v. Gould*, 475 U.S. 282, 290 (1986). But under the Seventh Circuit's ruling, the "main question" in this federal preemption case has become whether a state-imposed condition on the receipt of a grant of state funds comports with this Court's decisions on the constitutional limits on federal spending. (App. 4a).

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[3] As noted in the Petition, private parties who are not "employers in the construction industry" are prohibited by Section 8(e) of the NLRA from requiring other employers to adopt labor agreements, as the State has done here. Pet. at 9. The Opposition does not contest this settled reading of the NLRA's plain language, and unlike the situation in *Boston Harbor*, the Opposition identifies no private actor who would be permitted under the Act to engage in the kind of conduct engaged in here by the State.

- Before this case, *Boston Harbor* was understood not to allow states to use their spending power as a "pretext for regulating labor relations." *See Gould, supra*, 475 U.S. at 287, 291. But the Seventh Circuit's decision expressly authorizes states to "shower benefits" on labor union supporters, thereby interfering with the private balance of labor relations in a manner expressly prohibited by this Court in *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132 (1976).

Thus, contrary to the Opposition's efforts to minimize the significance of the Seventh Circuit's decision, it is indisputable that the court of appeals has dramatically departed from previously settled understandings of labor law preemption, thereby creating serious conflicts with decisions of this Court and other courts of appeals. The Petition should be granted so that the Court can resolve these conflicts and restore the rightful balance among employers, employees, unions mandated by the NLRA in all jurisdictions of the country.

The remaining arguments of the Opposition provide no reason to decline review. First, the Opposition contests Petitioners' characterization of the challenged Illinois Renewable Fuels Development Program Act as "broad, general, and fraught with ambiguity." The IRFPDA speaks for itself, and is contained in the Appendix to the Petition. (Pet. App. 13a-17a). Among other facial defects, the Act contains no findings supporting its labor provisions and no limitations on the scope of

the project labor agreements that are mandated by the law.[4]

The Opposition further claims that the Seventh Circuit's decision avoids, rather than creates, a conflict, citing the decisions in *Building and Constr. Trades Dept, Afl-CIO v. Allbaugh*, 295 F. 3d 28 (D.C. Cir. 2002), *cert. denied*, 537 U.S. 1171 (2003), and *Hotel Employees & Restaurant Employees Union, Local 57 v. Sage Hospitality Resources, LLC*, 390 F. 3d 206 (3d Cir. 2004), *cert. denied*, 544 U.S. 1010 (2005). In *Allbaugh*, the D.C. Circuit upheld a Presidential Executive Order that *avoided* interference with private sector labor relations by "neither requiring nor prohibiting" PLAs on federal projects. In *Sage*, the Third Circuit did allow a government agency to impose a PLA requirement, but only after finding that the government was acting in furtherance of its proprietary interests as an investor in the (single) project at issue. Neither case supports the Seventh Circuit's holding, and a finding in favor of preemption by the court of appeals in the present case would have created no conflict whatsoever.

Finally, the Opposition maintains that the State's conditioning of its funds upon employers' adoption of union agreements under the IRFPDA does not fall within the scope of the *Garmon* or *Machinists* preemption doctrines. Opp. at 19-21. In

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[4] The Opposition improperly relies on post-enactment executive pronouncements as remedies for the facial overbreadth and missing legislative findings of the Act. The statute's regulatory purpose can only be judged by the actions and words of the legislature itself.

order to make this claim, the Opposition asserts that petitioners, as employers, cannot invoke the protections of Sections 7 or 8 of the NLRA. This contention is squarely contradicted by this Court's holding in *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103 (1989) (*Golden State II*). There, having found preempted a city's conditioning of a franchise renewal on an employer's settlement of a labor dispute (in *Golden State I*, 475 U.S. 608 (1986), the Court rejected the city's further argument that its conduct did not violate any rights secured by the NLRA to employers, as follows:

> The NLRA...creates rights in labor and management both against one another and against the State.... The rights protected against state interference, moreover, are not limited to those explicitly set forth in section 7 as protected against private interference. The NLRA...has long been understood to protect a range of conduct against state but not private interference.... And, contrary to the city's contention, resort to economic weapons should more peaceful measures not avail is the right of the employer as well as the employee.

Id., 493 U.S. at 109-110 (citations omitted).

The condition imposed by Los Angeles and struck down by this Court in *Golden State Transit* was neither as intrusive nor as broad in its scope as the condition imposed by the state law at issue here. Just as the Court found Los

Angeles to have unlawfully interfered with private sector labor relations in that case, the Seventh Circuit was required to find unlawful interference here. Only by misinterpreting *Boston Harbor,* ignoring *Golden State Transit* and *Cardinal Towing*, and applying the inapposite "federal spending" cases did the Seventh Circuit avoid finding that the IRFPDA was preempted. Contrary to the Opposition, the court of appeals decision conflicts with each of these precedents and raises important constitutional issues that can only be resolved by this Court.

CONCLUSION

For each of the reasons stated above and in the Petition, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

/s/

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